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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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ILLINOIS
COMMERCE COMMISSION

2004 NOV -51 A 10: 38

Illinois Commerce Commission,

-vs-

Resource Technology Corporation,

Citation to show cause for continued QSWEF

Certification of Pontiac Facility and to

Investigate compliance with the final order in

Docket 97-0031 through 97-0045

Consolidated

CHIEF CLERK'S OFFICE
02-0461

Administrative Law
Judge Hilliard

TRUSTEE'S MOTION TO COMPEL

Gregg E. Szilagyi, as Chapter 11 Trustee ("Trustee") for Resource Technology Corporation ("RTC"), pursuant to Illinois Commerce Commission ("Commission") Rules of Practice, Sections 200.190, 200.350 and 200.370, and the due process clauses of the Illinois and United States Constitutions, hereby moves to compel the production of: (a) all documents that the Commission Staff ("Staff") has withheld on the basis of a "non-testifying staff witness" privilege and (b) all documents withheld on the basis of relevance. In support of its motion, the Trustee states as follows:

FACTUAL BACKGROUND

1. On October 8, 1997, the Commission entered an Order granting qualified solid waste energy facility ("QSWEF") status to a facility located in Pontiac, Illinois and operated by RTC ("Pontiac facility"). Subsequently, on July 10, 2002, based on Staff's allegation that the Pontiac facility is no longer using methane gas generated from landfills as its primary fuel, the Commission ordered that a proceeding be initiated to determine whether the Pontiac facility continued to meet the QSWEF requirements.

2. On June 11, 2004, the Trustee¹ requested Staff's responses to numerous outstanding RTC discovery requests. Exhibit A: June 11, 2004 Champagne/Feeley Correspondence. On July 8 and July 21, 2004, Staff responded to the outstanding discovery requests. In particular, in response to RTC Data Request 21, which seeks "all correspondence, including e-mails, regarding RTC, its facilities and the issues involved in the [above-captioned case] which are in the possession of the ICC and its Staff," Staff objected on the basis of relevance, privilege, burdensomeness and stated that "there is no basis under the Commission Rules of Practice to allow parties to Commission proceedings to conduct discovery of non-testifying Staff members. Exhibit B: July 21, 2004 Staff's Second Supplemental Response To RTC Data Request 21 (without attachments).² Staff produced documents with numerous unexplained redactions and missing attachments.

3. In response, the Trustee requested copies of the missing information or, alternatively, requested confirmation of whether Staff was asserting a privilege over these materials and, if so, requested a privilege log identifying what information was being withheld and what privilege was being asserted. Exhibit C: July 29, 2004 Champagne/Feeley Correspondence. Staff refused to provide this information and continued to cloud its response, stating:

There is no basis under the Commission Rules of Practice to allow parties to Commission proceedings to conduct discovery of non-testifying Staff members. Therefore, any correspondence from those Staff members who are non-testifying members have either been redacted or not included in

¹ On November 15, 1999, an involuntary bankruptcy case was filed against RTC. Subsequently, on February 1, 2000, a consensual Order For Relief And Order Converting The Bankruptcy Case To A Case Under Chapter 11 of the Bankruptcy Code became effective. On August 26, 2003, Gregg E. Szilagyi was appointed as the Chapter 11 Trustee for RTC.

² In its discovery responses, Staff stated the Staff members who will be testifying are David A. Borden and Tom Griffin. On October 7, 2004, Staff submitted its direct testimony, which includes only the testimony of Staff witness David A. Borden and its expert witness Michael J. Carolan.

the documents provided to RTC in response to RTC 21. For the remaining redactions or documents not provided to RTC, those redactions and or documents contain either correspondence protected by attorney/client privilege or correspondence not relevant to the issues in this proceeding.

Exhibit D: August 13, 2004 Feeley/Kimbarovsky and Champagne Correspondence.

4. Staff also refused to provide a privilege log on the basis that it had “segregated” the documents that are “either (1) correspondence from a non-testifying witness, (2) protected by attorney client privilege and/or (3) not relevant to the issues in this proceeding” and, therefore, could “provide[] [the documents] to the ALJ for his review in the event that RTC challenges Staff’s objections and the ALJ ultimately determines that a review of the documents is necessary.” *Id.*

5. In response, the Trustee pointed out that no legal authority supported Staff’s position and that, without the requisite information from a privilege log, the Trustee has utterly no ability to challenge the unknown documents withheld. Exhibit E: August 19, 2004 Champagne/Feeley Correspondence. Staff maintained its position that no privilege log was necessary and, oddly and significantly, attempted to justify its position by stating that “[w]hile there is no basis under the Commission’s Rules of Practice to allow parties to Commission proceedings to conduct discovery of non-testifying Staff members, without waiving that objection, RTC has been provided documents in the possession of Mr. Harold Stoller, a non-testifying Staff member”

Exhibit F: August 25, 2004 Feeley/Kimbarovsky and Champagne Correspondence.

6. Ultimately, after a face-to-face conversation between counsel for the Trustee and counsel for Staff and additional correspondence from the Trustee (Exhibit G: August 28, 2004 Champagne/Feeley E-Mail), Staff agreed to produce a privilege log for the withheld documents and identified Sections 200.40 and 200.340 of the Commission’s

Rules of Practice as the legal support for Staff's position that the Trustee is not entitled to discovery from non-testifying Staff witnesses. Exhibit H: September 1, 2004 Feeley/Kimbarovsky and Champagne Correspondence.

7. On October 26 and November 3, 2004, counsel for the Trustee and counsel for Staff discussed outstanding discovery issues in telephone conferences but were not able to resolve the matters set forth herein.

PRIVILEGE LOG

8. On September 22, 2004, Staff completed production of its privilege log. Exhibit I: Privilege Log A, Privilege Log B and Privilege Log C and D.

9. The privilege logs assert the "non-testifying Staff witness" privilege throughout. However, in many instances, it remains unclear on what basis Staff is refusing to produce the withheld materials because Staff repeatedly claims the following objection: "Attorney/Client, Relevance, **and/or** Non-testifying Staff witness." Exhibit I: Privilege Log A at pp. 4-11, 14-16, 18, 20-21 and 23-27 and Privilege Log B at pp. 22, 25-26 and 28.

10. The privilege logs also claim mere "relevance" as an objection to the disclosure of several documents. Exhibit I: Privilege Log A at pp. 1, 18-19 and 28-30; Privilege Log B at pp. 7, 10 and 27; and Privilege Log C at pp. 1, 4-6 and 9.

11. Staff is withholding evidence that could be critical to RTC's defense. This is a proceeding to revoke RTC's QSWEF status at the Pontiac facility. Staff's description in the privilege logs of the documents withheld reveals that these documents directly relate to the issues in this case, *e.g.*, "[e]stimate of tax credit for RTC Pontiac

Sales over 10MW,” “RTC Pontiac,” “RTC site visit,” “Meeting to discuss RTC.” Exhibit I: Privilege Log A at pp. 7 and 9 and Privilege Log B at pp. 2-3 and 10.

ARGUMENT

12. It is well established that discovery is to be “a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial.” *Pemberton v. Tieman*, 117 Ill. App. 3d 502, 504, 453 N.E.2d 802, 804 (1st Dist. 1983). Moreover, an administrative hearing is not a partisan hearing with the agency on one side and the respondent on the other. Rather, the administrative hearing is designed to ascertain and make findings of fact. *Fleming v. Illinois Commerce Comm’n*, 338 Ill. 138, 147, 57 N.E.2d 384, 390 (1944). Accordingly, an administrative agency must disclose all exculpatory evidence and all evidence upon which its decision-making process is based. *See Montgomery v. Department of Reg. and Educ.*, 146 Ill. App. 3d 222, 225-26, 496 N.E.2d 1100, 1102-03 (5th Dist. 1986); *Cook County Fed. Savs. & Loan Ass’n v. Griffin*, 73 Ill. App. 3d 210, 215-18, 391 N.E.2d 473, 477-79 (1st Dist. 1979).

13. Notwithstanding these principles and requirements, Staff has invoked a legally insupportable basis for withholding documents from the Trustee. Specifically, Staff claims that the Trustee is not entitled to discovery from non-testifying Staff witnesses. As the sole legal authority to support this position, Staff relies upon Section 200.340 and Section 200.40 of the Commission’s Rules of Practice. Exhibit H: September 1, 2004 Feeley/Kimbarovsky and Champagne Correspondence. These rules, however, do not come close to supporting such a position.

14. Section 200.340 sets forth the Commission's policy on discovery and provides:

It is the policy of the Commission to obtain full disclosure of all relevant and material facts to a proceeding. Further, it is the policy of the Commission to encourage voluntary exchange by the parties and staff witnesses of all relevant and material facts to a proceeding through the use of requests for documents and information. Formal discovery by means such as depositions and subpoenas is discouraged unless less formal procedures have proved to be unsuccessful. It is the policy of the Commission not to permit requests for information, depositions, or other discovery whose primary effect is harassment or which will delay the proceeding in a manner which prejudices any party or the Commission, or which will disrupt the proceeding.

83 Ill. Admin. Code § 200.340. Section 200.40 is the three-page "Definitions" section for the Commission's Rules of Practice. These rules simply do not provide support for Staff's position.

15. Staff's position also makes no practical sense. Staff would essentially be allowed to manipulate which evidence it was required to produce by picking and choosing among its potential witnesses. Staff also could circumvent disclosure by giving documents in the possession of testifying Staff witnesses to non-testifying Staff witnesses and claim that the documents are protected. This cannot be the rule.

16. Furthermore, Staff has waived its claim that the Trustee is not entitled to discovery from non-testifying Staff witnesses because it already has in fact produced documents from a non-testifying Staff witness. As set forth in Staff counsel's August 25, 2004 correspondence (Exhibit F), Staff counsel produced documents in the possession of Mr. Harold Stoller, a non-testifying Staff member. Counsel's belated attempt to claim that he did so "without waiving that objection," does not cure the waiver. Staff should be

required immediately to produce all documents withheld on the basis of the "non-testifying Staff witness" privilege.

17. Moreover, Staff should be required to produce all documents withheld on the basis of "relevance" as there is no basis to assert that the materials sought are not relevant to RTC's defense in this proceeding.

18. As set forth above, pursuant to Commission Rule of Practice, Section 200.350, the Trustee's counsel unsuccessfully attempted to resolve this matter with Staff's counsel.

CONCLUSION

For each of the reasons set forth above, either independently or in combination, Gregg E. Szilagyi, as Chapter 11 Trustee for Resource Technology Corporation, urges this Court to order Illinois Commerce Commission Staff to produce: (a) all documents withheld on the basis of the "non-testifying staff witness" privilege and (b) all documents withheld on the basis of relevance.

November 4, 2004

Respectfully submitted,



One of the attorneys for Gregg E. Szilagyi,
as Chapter 11 Trustee for Resource
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Illinois Commerce Commission,)	
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Investigate compliance with the final order in)	
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NOTICE OF FILING

To: Attached Service List

PLEASE TAKE NOTICE that on Thursday, November 4, 2004, we sent via federal express for filing with the Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, **Trustee's Motion To Compel**, a copy of which is hereby served upon you.


One of the Attorneys for Gregg E. Szilagyi, as
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CERTIFICATE OF SERVICE

I, Kathleen Holper Champagne, an attorney, hereby state that I caused true and correct copies of the foregoing **Notice of Filing** and **Trustee's Motion To Compel** to be served upon the Attached Service List by depositing same in a sealed envelope, postage prepaid, in the U.S. Mail at 3500 Three First National Plaza, Chicago, Illinois 60602, on November 4, 2004, before the hour of 5:00 p.m.


Kathleen Holper Champagne

ICC Docket No. 02-0461

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